No. 85-24

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF MARYLAND,

Petitioner,

v.

KAMEL ALI ELFADL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTION PRESENTED FOR REVIEW

Whether the self-incrimination clause of the Fifth Amendment requires the suppression of the statement made by the defendant after proper Miranda warnings had been given and valid waivers of rights obtained solely because the interrogation was not interrupted when an unsolicited attorney appeared at the stationhouse requesting to see the defendant?

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IN THE

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October Term, 1985

STATE OF MARYLAND,

Petitioner

v.

KAMEL ALI ELFADL,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

OPINION OF THE COURT BELOW

The opinion of the Court of Special Appeals of Maryland in the case of Kamel Ali ElFadl v. State, September Term, 1984, No. 506, reported at 61 Md.

App. 132, 485 A.2d 275, cert. denied, __ Md. __ (1985), is reproduced in the Appendix.

STATEMENT OF JURISDICTION

The opinion of the Court of Special Appeals in ElFadl was filed January 3, 1985, and the State of Maryland's petition for writ of certiorari was denied by the Court of Appeals of Maryland on May 10, 1985. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3) and Rules of the Supreme Court of the United States, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Petitioner seeks certiorari in this case from the decision rendered by the Maryland Court of Special Appeals reversing the Respondent's convictions and remanding for a new trial. The convictions against Respondent arose from a multiple murder where an off-duty police officer, working as a private security guard for a gasoline station-grocery store (hereinafter "Mini-Mart"), and the Assistant Manager of the Mini-Mart were shot to death in the Mini-Mart parking lot by two individuals as the Assistant Manager was approaching the officer with the evening's receipts.

Respondent ElFadl was convicted by a jury in the Circuit Court for Calvert County, Maryland following removal from Prince George's County, of murder in the first degree as a principal in the first degree of the Assistant Manager, murder in the first degree as a principal in the second degree of the police officer, armed robbery and related conspiracy counts. A capital sentencing hearing was convened pursuant to Article 27, §413 of the Maryland Code, ElFadl electing to be sentenced by the jury that convicted him. When the jury could not reach a decision on sentence, the trial court imposed six consecutive life sentences and three consecutive 20 year terms of imprisonment upon ElFadl. An appeal was taken to the Maryland Court of Special Appeals which reversed the convictions based upon the trial court's ruling on a pre-trial motion to suppress ElFadl's written statements. See Apx., pp.

18-22. The State's Petition for Writ of Certiorari was denied by the Maryland Court of Appeals.[1]

The facts relevant to the ruling on the statements were derived at a consolidated pre-trial hearing in the Circuit Court for Prince George's County prior to the removal of the case. These facts disclosed that a search of the crime area was conducted on the morning following the shooting and a shipping carton for a 20 gauge shotgun was discovered and traced to ElFadl. At 3:00 p.m. on the day after the killing, Sunday, June 12, 1983, three police vehicles converged at an intersection on ElFadl's vehicle and ElFadl was taken to the police station for

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[1] Kenneth James Lodowski was convicted of first degree murder of the police officer as the principal in the first degree and of the store manager as a principal in the second degree, in a separate trial. A capital sentencing proceeding resulted in the imposition of a death sentence. Although separately interrogated and represented by different counsel, the same issue brought about the reversal of Lodowski's convictions by the Maryland Court of Appeals. (His death sentence was also set aside on other grounds). Review of that decision is similarly sought by separate petition filed simultaneous with this one.

interrogation. Because the police believed that ElFadl was not yet an accused, he was not provided his rights in accordance with Miranda. A statement was obtained and reduced to writing. This statement was ultimately suppressed by the trial court.

Following the initial interrogation, ElFadl remained at the police station where he agreed to submit to a polygraph examination after being advised of his rights. The polygraph examination lasted until shortly after 6:00 a.m. on Monday, and ElFadl was then interviewed by a number of other officers. At 4:00 p.m. on Monday, ElFadl gave consent to search his apartment and, following the search, ElFadl was allowed to remain in his apartment. However, ElFadl remained under constant surveillance by the Special Operations Division of the Prince George's County Police Department.

On Wednesday, June 15, ElFadl contacted an attorney. An appointment was made for 2:00 p.m. the next day. However, on that day ElFadl stopped at the

police station on the way to his appointment to retrieve his driver's license which had been left at the time of the initial interrogation. When ElFadl appeared, the police asked if ElFadl would agree to talk for a few minutes. He was advised of his Miranda rights, and waived them. The interrogation continued throughout the night, with a readvisement of rights and rewaiver occurring whenever the interrogator changed. The interrogation continued on the following day when ElFadl admitted complicity in the robbery/murder. At 3:25 p.m. on Friday, June 17, ElFadl was taken before a District Court Commissioner for presentment.

ElFadl's wife, Lina Sleem, had accompanied ElFadl to the police station on Thursday, and did not leave until 4:00 a.m. on Friday. Ms. Sleem called an attorney later that morning and received a return call from the attorney at 1:00 p.m. The attorney was ultimately retained by her at approximately 3:00 p.m. and at 3:30 p.m. the attorney called the police station,

indicated a desire to speak with his client and a desire for the interrogation to cease. The attorney was told by the desk sergeant that his request was being denied since ElFadl was in an interview that was not going to be interrupted.

At 3:45 p.m. ElFadl's presentment was completed and ElFadl was returned to an interview room where he was once again advised of his Miranda rights and waived them, and then began to dictate a 12 page statement which the detective typed.

The attorney retained by ElFadl's wife arrived at 4:20 p.m. and was once again advised that he could not at that time see ElFadl because ElFadl had not personally expressed any desire to see an attorney. This refusal continued throughout the afternoon and evening. On the following morning, Saturday, the attorney called the police and was again refused permission to speak with ElFadl. Around 1:00 p.m. on Saturday the attorney was called and told that ElFadl was now at the Prince George's County Detention

Center, where the attorney was ultimately allowed to meet with ElFadl. The trial court refused to suppress any of the statements other than the initial statement which had been taken without the benefit of a Miranda waiver.

ARGUMENT

WHERE A DEFENDANT DOES NOT REQUEST TO SPEAK WITH AN ATTORNEY AND VALIDLY WAIVES THE RIGHT TO AN ATTORNEY BEFORE MAKING A STATEMENT, THE SUBSEQUENT DEMAND OF AN ATTORNEY TO SPEAK WITH THE DEFENDANT DOES NOT INVALIDATE THE WAIVER AND DOES NOT RENDER THE ENSUING STATEMENTS INADMISSIBLE.

A.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED IN ORDER TO INSURE CONSISTENCY WITH THE CASE OF MORAN v. BURBINE, NO. 84-1485, cert. granted, __ U.S. __ (1985).

The issue on which the State of Maryland here seeks review is currently pending before this Court in the case of Moran v. Burbine, No. 84-1485, on certiorari to the United States Court of Appeals for the First Circuit to review the decision rendered in

Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985). In fact, the issue arises in this case in a purer posture than Burbine because: (1) the circumstances here do not involve any deception of the defense attorney by the police; and (2) the interpretation of the United States Constitution here came on direct appeal rather than on collateral habeas corpus review. Thus, the granting of the instant petition is required to achieve consistency in interpretation of the federal constitution. Moreover, if the issue presented concerning the effect of the assertion of the right to counsel by someone other than the accused is not addressed because of the additional element of deception or because of the limited nature of federal habeas corpus review, the instant case will provide this Court with an opportunity to address the issue. As a result, the petition should be granted.

B.

THE QUESTION PRESENTED IS SUBSTANTIAL AND THE SUBJECT OF A SPLIT IN AUTHORITY AMONG THE STATES.

While law enforcement authorities must adhere to constitutional safeguards in the interrogation of suspects, a police investigation must be allowed to proceed unimpeded where constitutional rights are not violated. In these cases, interrogation proceeded only after repeated advisement and waiver of constitutional rights, including the right to have an attorney present before giving any statement and the right not to give any statement. Thus, the police here conducted an intense investigation while adhereing to the rules outlined by this Court in Miranda v. Arizona, 384 U.S. 436 (1966) and Edwards v. Arizona, 451 U.S. 477 (1981). The Maryland Court of Special Appeals has now imposed additional requirements upon law enforcement authorities unrelated to the knowledge of the accused or the voluntariness of the conduct of the accused. Rather, the Maryland court's interpretation

of the Fifth Amendment gauges the admissibility of a statement on the conduct of the law enforcement authorities toward a third party.

There is simply no basis for such an extension. The holding of the Maryland court will effectively divert attention from the relationship between the police and the accused to questions such as whether the attorney was "retained" prior to asserting the rights of his "client." The holding also raises the spectre that unethical conduct by an attorney could bring an interrogation to a halt by merely arriving at the stationhouse. The Fifth Amendment and its enforcement through the exclusionary rule was designed to protect the rights of a defendant, not to create an obstacle course that would greatly impede police investigations. The substantial impact of the decision of the Maryland Court of Special Appeals clearly supports review.

Further, review is necessary because of conflicting interpretations among the various state

courts that have considered the issue. New York, for example, holds that there can be no valid waiver without counsel's presence when an attorney is in the case. See, e.g., People v. Hobson, 384 N.Y.S.2d 419, 420, 348 N.E.2d 894, 896 (1976). Other states such as Delaware (Weber v. State, 457 A.2d 674 (Del. 1983)), Massachusetts (Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969)), Pennsylvania (Commonwealth v. Hilliard, 370 A.2d 322 (Pa. 1977)), and Oregon (State v. Haynes, 602 P.2d 272 (Ore. 1979), cert. denied, 446 U.S. 945), have adopted an absolute exclusionary rule holding that there is a difference between waiving an attorney in the abstract and waiving the right to a specific attorney retained for the particular defendant. In still other jurisdictions, such as Rhode Island (State v. Burbine, 451 A.2d 22 (R.I. 1982)), Missouri (State v. Beck, 687 S.W.2d 155 (Mo. 1985), California (People v. Saidi-Tabatabai, 86 Cal.Rptr. 866 (Cal.App. 1970)), Iowa (State v. Blanford, 306 N.W.2d (Io. 1981)), and Ohio (State v.

Chase, 378 N.E.2d 1064 (Ohio 1978)), the failure to advise a defendant that a specific attorney is available on his behalf does not conclusively establish the invalidity of the waiver, but rather is merely a factor to consider in determining whether the waiver was knowingly and intelligently entered. Because of the divergent authority on the issue, review of the substantial question presented is warranted.

C.

UNDER THE CIRCUMSTANCES PRESENT HERE, THE TRIAL COURT CORRECTLY CONCLUDED THAT THE WAIVER OF THE RIGHT TO SILENCE AND RIGHT TO AN ATTORNEY WERE VALID UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The holding of the Maryland Court of Special Appeals clearly constitutes an expansion of this Court's opinion in Miranda v. Arizona, 384 U.S. 436 (1966). Yet, "a state may not impose . . . greater restrictions as a matter of federal constitutional law when this court specifically refrains from imposing them." Fare v. Michael C., 442 U.S. 707, 717 (1979),

quoting Oregon v. Hass, 420 U.S. 714, 719 (1975). As a result, the decision of the Maryland Court of Special Appeals must be reversed.

In New York v. Quarles, 467 U.S. __, 81 L.Ed.2d 550, 104 S.Ct. 2626 (1984), this Court outlined the importance of retaining rigid adherence to the "bright line" rule of Miranda. Although in Quarles, the Court did delineate a public safety exception to Miranda, it noted the importance of retaining the rigidity of the Miranda rule, citing as examples, Minnesota v. Murphy, ___ U.S. ___, 79 L.Ed.2d 409, 104 S.Ct. 1136 (1984) (refusal to extend Miranda requirements to interviews with probation officers); Fare v. Michael C., supra (refusal to equate request to see a probation officer with request to see a lawyer for Miranda purposes); Beckwith v. United States, 425 U.S. 341 (1976) (refusal to extend Miranda requirements to questioning in non-custodial circumstances). The Maryland Court of Special Appeals' attempt to expand Miranda should be rejected here, as well.

The Court of Special Appeals' decision imposes upon the police the obligation not only to inform an accused of his rights as outlined in Miranda, but additionally to inform him of the existence of a specific attorney retained to represent the accused where such information is known to the police. There is simply no such obligation under the law as set forth in Miranda. As this Court has noted in California v. Prysock, 453 U.S. 355 (per curiam 1981), advising an accused of his right to an attorney generally satisfies the Miranda requirement. It is evident, therefore, that the failure to advise an accused of a specific attorney does not constitute a violation of Miranda in and of itself.

Further, the failure to provide such information does not in and of itself invalidate any waiver of the right to an attorney. As this Court recognized in Fare v. Michael C., supra, 442 U.S. at 725, in order to ascertain whether the accused in fact knowingly and voluntarily decided to forego his rights to remain

silent and to have the assistance of counsel, it is necessary to inquire into the totality of the circumstances surrounding the interrogation. Yet, the Maryland court refused to consider the surrounding circumstances, holding that the failure to advise the accused of the presence of a specific attorney deprived the accused of sufficient knowledge validly to waive any Fifth Amendment right to counsel. In so holding, the Maryland court did not explain how the presence of a specific attorney affects an accused's understanding of the importance of an attorney and the right to have an attorney even if one cannot afford to pay. The holding of the Maryland court seems to be that a waiver that is perfectly valid one minute will become invalid the next simply because an attorney

presents himself to the police as representing the accused.[2]

This Court has repeatedly recognized that the self-incrimination clause of the Fifth Amendment is personal to the accused. See, e.g., United States v. Nobles, 422 U.S. 225, 233 (1975). However, the interpretation of the Fifth Amendment prescribed by the Maryland Court of Special Appeals, although couched in terms of invalid waiver, in effect relates the invocation of an accused's Fifth Amendment rights to the presence of an attorney. Such an interpretation clearly runs afoul of the notion that the self-incrimination protection is personal to the accused. Where, as here, the defendant was advised of his right

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[2] Had the Maryland court considered the totality of the circumstances in judging the adequacy of the waiver, it would have become apparent that the Miranda advisement of the right to counsel was more than mere words. ElFadl had already called a lawyer and was, in fact, on his way to an appointment with his lawyer when he agreed to further interrogation by the police. Despite these circumstances, however, the Maryland court chose to apply a rule of per se invalidation of the Miranda waiver.

to remain silent and right to an attorney, but chose to waive those rights, the mere existence of an attorney at the stationhouse should not erode the validity of the waiver.

Because the decision of the Maryland Court of Sepcial Appeals constitutes an unwarranted expansion of Miranda, render invalid any waiver of Miranda rights without a consideration of the totality of the circumstances, and in effect permits the assertion of a right to silence by someone other than the accused, reversal of this decision is necessary.

Review and reversal of the decision is further mandated because of the Maryland Court of Special Appeals' reliance upon the Sixth Amendment to the United States Constitution in reversing the conviction. The right to counsel at issue here is the right to counsel under the Fifth Amendment, delineated in Miranda as one of the procedural mechanisms designed to safeguard an individual's

constitutionally based right against self-incrimination. The Sixth Amendment right to counsel attaches only at or after initiation of adversary judicial proceedings. United States v. Gouvia, __ U.S. ___, 81 L.Ed.2d 146, 104 S.Ct. 2292 (1984). This Court has never held that the Sixth Amendment right to counsel attaches at the time of arrest. Id. Even though ElFadl was taken before a Commissioner following his oral confession on a statement of charges, he did not stand at that time charged by information or indictment so as to invoke the jurisdiction of the trial court. See State v. Gee, 298 Md. 565, 572-574, 471 A.2d 712, 715-716 (1984). As the criminal prosecution was not formally commenced, any reliance upon the Sixth Amendment right to counsel is clearly misplaced.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests the issuance of a writ of certiorari to review the judgment and opinion of the Maryland Court of Special Appeals in the instant case.

Respectfully submitted,

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APPENDIX

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 506

September Term, 1984

KAMEL ALI ELFADL

v.

STATE OF MARYLAND

Bloom,
Getty,
Bell, Robert M.
JJ.

Opinion by Getty, J.

Filed: January 3, 1985

On December 16, 1983, the State filed a Suggestion for Removal in the case of Kamel Ali Elfadl, appellant herein, who was charged, jointly with Kenneth James Lodowski,[1] in a nine count indictment with the murder of Carlton X. Fletcher and Minh Huong Phamdo. Additionally, appellant was charged with six counts of conspiracy and armed robbery of Phamdo. Appellant's case was removed to the Circuit Court for Calvert County where, following a jury trial, he was convicted on all nine counts (as a principal in the second degree in the premeditated murder of Fletcher and as a principal in the first degree in the premeditated murder of Phamdo). Appellant was sentenced to six consecutive terms of life imprisonment[2] and to three consecutive twenty year

[1]Appellant's co-defendant, Lodowski, was tried separately in the Circuit Court for Charles County, convicted and sentenced to death. His appeal is pending before the Court of Appeals.

[2]Murder of Fletcher (first count); murder of Phamdo (second count); conspiracy on June 11, 1983, to murder Fletcher (third count); conspiracy to murder Phamdo (fourth count); conspiracy between May 1 and June 18,

terms of imprisonment.[3]

Appellant has preserved five issues for review, namely:

1. Did the trial court err in denying appellant's motion to suppress the extra-judicial statements given to the police?

2. Did the trial court err in permitting the case to be removed from Prince George's County upon suggestion by the State?

3. Was appellant properly convicted and sentenced on six separate conspiracies?

4. Did the trial court err in denying appellant's request to have the writings on the waiver of rights forms examined by an expert chromotographer?

5. Did the trial court err in permitting the State's witnesses to refer to the first statement, which was

1983, to murder Fletcher (fifth count); conspiracy between May 1, and June 18, 1983, to murder Phamdo (sixth count).

[3]Armed robbery of Phamdo (seventh count); conspiracy on June 11, 1983, to rob Phamdo (eighth count); conspiracy between May 1 and June 18, 1983, to rob Phamdo (ninth count).

suppressed by the trial court, prior to appellant testifying on his own behalf?

Background

At 11:45 p.m. on Saturday, June 11, 1983, Prince George's County policeman Carlton X. Fletcher and Ming Huong Phamdo, Assistant Manager of the Goddard Minimart in Greenbelt, were shot and killed by two assailants who robbed them of more than $20,000.00. The money represented the night deposit of the Minimart which was to be deposited by Phamdo; Fletcher accompanied him as a guard. Phamdo walked from the minimart carrying several money bags in a paper sack. Fletcher was seated nearby in a marked Prince George's County patrol car. Phamdo was fatally shot in the right chest by a rifle slug fired from a twenty gauge shotgun as he approached his car which was parked near the police vehicle. Fletcher was killed by a shotgun blast to the left side of his neck while seated in the cruiser. In short, Phamdo and

Fletcher were ambushed. Allegedly, appellant killed Phamdo and Lodowski killed Fletcher.

Investigators at the scene recovered a spent twenty gauge shotgun shell and a shipping carton for a twenty gauge shotgun. The carton was traced to a J. C. Penny Store where appellant had purchased the shotgun on March 25, 1983.

Appellant was stopped by the police while driving his car on the day following the murder. He accompanied the officers present to the police station where he was interviewed for approximately ninety minutes by Detective Steven Ricker. At approximately 5:40 p.m., Detective David Hatfield took over the questioning which continued for nearly three hours. At 8:30 p.m. appellant indicated that Sunday was a Moslem religious day and he desired to go to his apartment to pray and eat. Accompanied by two police officers, appellant was allowed to fulfill his request.

Between 9:30 and 9:45 p.m., appellant was returned to the police station where the questioning resumed. Sometime prior to 1:30 a.m. on June 13, the substance of the interview was reduced to writing and signed by appellant. Appellant then consented to undergo a polygraph examination that lasted for two and one-half hours. Additional questioning by the police continued until 3:00 p.m. on Monday, June 13, at which time appellant was returned to his apartment. A consent search of the apartment was conducted wherein the police recovered some items and departed. Officer Hatfield ordered a continuous surveillance of appellant after leaving him at the apartment.

Recapping, the initial detention covered a twenty-four hour period; from 3:00 p.m. Sunday, June 12, to 3:00 p.m. Monday, June 13. No Miranda warnings were given, the police maintaining that appellant was not a suspect at the time and that he was free to leave if he chose to do so. The statement,

however, was suppressed by the trial judge for failure to advise appellant of his Miranda rights after he became a suspect in the murders.

Appellant became aware of the surveillance following his release and contacted an attorney, Stephen Kiefert, on Wednesday, June 16. He advised Kiefert that he had been questioned about the recent murders and he made an appointment to meet with the attorney at 2:00 p.m. the following day. The police had retained appellant's driving license and on Thursday morning he telephoned the police in an effort to retrieve the license. He was told to come to the station.

At 12:30 p.m. appellant and his wife went to the police station and met with Detective Hatfield. Appellant stated that he advised Hatfield of his appointment with an attorney at 2:00 p.m.; Hatfield denied that any such statement was made. Appellant was then advised of his Miranda rights, executed a waiver form and the interrogation began anew.

The session with Hatfield began about 1:00 p.m. on Thursday afternoon and continued for nearly twelve hours until Detective Ferriter took over. Appellant was advised of his rights a second time and signed another waiver of those rights. After an hour with Ferriter, Detective Edgar (who had been quizzing Lodowski in another room) appeared, obtained a third waiver and questioned appellant until 3:00 a.m. Friday. Detective Hatfield returned, appellant executed a fourth waiver, and a second statement was typed between 5:34 a.m. and 10:36 a.m. Three pages of the eleven page statement were in appellant's handwriting, the remaining eight were typed. Appellant signed the statement shortly beore noon on Friday.

Within an hour of Hatfield's departure, Office Gentile confronted appellant who was asleep on a chair in the interrogation room. Appellant was awakened, advised of his Miranda rights, signed a waiver of those rights, and admitted his complicity in the murders. A

charging document was then prepared and a District Court Commissioner came to the police station where appellant was being held. The form prepared by the Commissioner indicated that appellant wished to have the services of an attorney. Appellant was committed without bail while Gentile, preceded by another signed waiver form, prepared a twelve page typed statement (the third statement) which was completed at 6:05 p.m. Thus, appellant's visit to the police station for the purpose of retrieving his driver's license resulted in a 29 hour stay; he arrived at 1:00 p.m. Thursday and the encounter concluded at 6:05 p.m. Friday.

Meanwhile, appellant's wife, who accompanied him to the police station to get his license, remained at the scene until 4:00 a.m. Friday. At noon on Friday she called another attorney, Harry Trainor. A second call to Trainor at 3:00 p.m. resulted in his being retained to represent appellant. Counsel's telephone request to the police seeking to speak with appellant was refused because the officer who received the call

"wasn't going to interrupt that particular interview." Arriving at the police station at 4:20 p.m., Trainor requested to speak with appellant and, when this was denied, requested the appellant be given counsel's card; this request was also refused.[4]

Trainor unsuccessfully continued his attempts either to see appellant or to have appellant advised of his presence. The first time that appellant and counsel met was on Saturday afternoon at the Detention Center in Upper Marlboro. The police concluded, and advised Trainor, that appellant was not his client because appellant did not call him.

We have set forth the time frame of the various interrogations in order that we may consider appellant's claim that he was denied his constitutional right to the assistance of counsel granted by the Sixth and Fourteenth Amendments to the Constitution.

[4]The efforts of counsel to converse with his client are markedly similar to the equally futile attempts set forth in Escobedo v. Illinois, 378 U.S. 478 (1964).

The first statement was suppressed for failure to advise appellant of his rights under Miranda. Statement number two was admitted by the trial court because it was preceded by Miranda warnings which the court concluded were effectively waived. The second statement, moreover, was exculpatory. Appellant admitted in his second statement his sudden pecuniary gain ($4,000.00) and attributed the source of the funds to three vaguely described men, one of whom had allegedly purchased appellant's shotgun several days before the robbery and murders. The third statement, also admitted into evidence at trial, was a confession by appellant that he and Lodowski planned and committed the robbery and two killings. This final statement was preceded by Miranda warnings and a signed waiver by appellant.

According to the record, counsel was retained, albeit without appellant's knowledge, at the same time the third statement was being reduced to writing. Conceding that appellant was not made aware of a

specific attorney's presence at the station house, and that the police denied counsel's request to confer with his client, the State maintains that any error in refusing to advise appellant of counsel's presence was harmless. The State contends that the oral confession was obtained by Detective Gentile prior to counsel's appearance and the written statement was thereby cumulative and merely a repetition of what Gentile testified to as appellant's oral confession. We are not persuaded that the introduction of a signed confession is harmless error beyond a reasonable doubt, Dorsey v. State, 276 Md. 638 (1978), even assuming that a prior oral statement may be admissible. A signed confession, in our view, is unquestionably more compelling evidence of guilt than a police officer's testimony that a defendant made incriminating admissions. In the latter situation the issue of credibility arises. A defendant may deny making inculpatory statements and the issue then becomes one of credibility for the trier of fact. A defendant who

has signed a confession has a more difficult task of persuading the trier of fact of his non-involvement in the crime alleged. We shall, therefore, address the issue of admissibility of the signed statement within the context of appellant's right to counsel and waiver of that right.

In Brewer v. Williams, 430 U.S. 397 (1977); 51 L.Ed.2d 424; 97 S. Ct. 1232, the Supreme Court stated:

> "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him - whether by way of formal charge, preliminary hearing, indictment, information or arraignment."

Accord, Massiah v. United States, 377 U.S. 201 (1964), holding that once adversary proceedings have commenced against him, an individual has a right to legal representation when the government interrogates him.

Unquestionably, judicial proceedings had been initiated against appellant before the third statement

was reduced to writing. He had appeared before a District Court Commissioner and had been committed without bond. His Sixth Amendment right to counsel had attached, at the very latest, by the time of his court appearance.[5]

Appellant cites Fowler v. State, 259 M. 95 (1970) as supportive of his alleged denial of a right to counsel. In Fowler, the defendant was subjected to interrogation over a four day period relating to a murder.[6] Prior to each interrogation session, Fowler was advised of his Miranda rights, but the record was silent as to any response from Fowler on each occasion. The police admitted, however, that on the fourth day (the day the confession was obtained) Fowler telephoned his brother to find out if an attorney had been contacted to represent him.

[5]The right to counsel attached when interrogation focused on appellant as an accused. It would exalt form over substance to defer the right to counsel until indictment. See Escobedo, supra, N. 4.

[6]Fowler was in police custody for six days. The questioning over the first two days related to offenses other than the murder.

An attorney arrived and conversed briefly with Fowler in the presence of several police officers. The attorney ascertained that Fowler had been advised of his Miranda rights and departed. Thereafter, the police continued their interrogation of Fowler resulting in a confession several hours later. Immediately after the oral confession, Fowler signed a mimeographed waiver from which included the Miranda warnings.

The Court of Appeals, in a four to three decision, held that the confession was obtained in violation of Fowler's rights under the Fifth and Sixth Amendments of the Constitution of the United States. The Court was disconcerted by:

1. Continued questioning after the telephone call seeking an attorney,

2. Ineffective consultation with counsel due to the presence of police officers during the interview between counsel and the accused and,

3. The waiver signed after the confession while "surrounded by his inquisitors."

In the case sub judice, Miranda rights were given and waivers signed before statements two and three were obtained. The testimony is conflicting as to whether appellant herein advised the police that he had a 2:00 p.m. appointment with an attorney; appellant asserts that he so advised the police and the officers involved deny that any such statement was made. That discrepancy, therefore, was for the trier of fact to resolve. We note further:

Fowler	Appellant
Miranda warnings - waiver after confession.	No Miranda ist statement (suprressed). Miranda warnings 2nd and 3rd statements. Waiver before confession.
Police aware that defendant sought an attorney.	Testimony conflicting. Appellant says he advised police of appointment with attorney - denied by police officers. Appellant advised District Court Commissioner that he desired counsel prior to typing and signing

	of written confession, but after oral confession.
In custody 6 days. Talked with family and attorney.	In custody 24 hours and released. Detained second time 29 hours. No communication with any non-police.
Attorney's request to see defendant prior to confession granted.	Attorney's request to see defendant denied while written statement (third) being transcribed.
Confession after conferring with counsel.	No counsel involved.

Appellant argues that Fowler recognizes that the police must afford an accused the right to consult with an attorney even where, as here, the request does not originate with the accused, but from someone else on the behalf of accused. We agree that the factual situation in Fowler involved an attorney being retained by the family for the accused, rather than by the accused personally. Nothing in our reading of Fowler, however, supports appellant's claim. The majority in Fowler held that effective consultation with counsel is

denied in an atmosphere where the accused is surrounded by his inquisitors during the interview with counsel. Thus, the Court concluded, the accused's Sixth Amendment right to counsel was abrogated. This in turn affects the quality of his volition in waiving his Fifth Amendment right not to incriminate himself.

We perceive appellant's principal argument as an assertion of an imperfect waiver of Fifth and Sixth Amendment rights based upon his contention that any waiver of counsel terminates once a specific attorney presents himself on behalf of the accused. Stated differently, the issue becomes whether the State, once an attorney is retained on appellant's behalf, must apprise appellant of that fact before further questioning may proceed. If the police are required to notify the accused that counsel is present, they must permit consultation between counsel and the accused, if requested by the accused, or advise the accused that counsel is readily available. The accused, of course, may again waive his right to confer with the

attorney. The police, however, may not continue the interrogation absent another waiver. Our appellate courts have not addressed the issue.

The State argues that the failure of the police to inform appellant of the availability of a specific attorney retained on his behalf does not per se invalidate the waiver. We should adopt, the State urges, the "totality of the circumstances" approach adopted by Rhode Island. State v. Burbine, 451 A.2d 22 (1982).

A majority of those states that have considered the issue have held that an effective waiver of counsel terminates once a specific attorney appears on behalf of the accused.[7] The procedure adopted by the majority of jurisdictions that have considered the issue

[7]Weber v. State, 457 Atl.2d 674 (Del. 1983); Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969); Commonwealth v. Hilliard, 370 Atl.2d 322 (Pa. 1977); State v. Haynes, 601 P.2d 272 (Ore. 1979, cert. denied, 446 U.S. 945; People v. Smith, 442 N.E.2d 1325 (Ill 1982); State v. Matthews, 408 So.2d 1274 (La. 1982); State v. Jones, 578 P.2d 71 (Wash. 1978).

mandates informing the accused of the availability of counsel and obtaining a rewaiver of Fifth and Sixth Amendment rights before continuing the interrogation.

The issue has been discussed most recently in Lewis v. State, No. F-83-354, Okla. Ct. Crim. App., ___ Pac.2d ___ (1984). In Lewis, an 18-year-old was arrested for homicide. Two hours after the arrest an attorney retained by the accused's parents arrived at the jail to locate and advise his client. Interrogation had not commenced at the time counsel appeared. The accused was never advised that counsel was available. Counsel was directed to various locations in the jail and courthouse. When he located his client one hour later, the accused had waived his right to counsel and had incriminated himself. On counsel's advice, however, he refused to sign a typed statement. The accused's conviction of first degree murder was reversed. The Court said:

> "[w]hen law enforcement officers have failed to admit counsel to a person in custody or to inform the person of the attorney's efforts to reach him, they

> cannot thereafter rely on defendant's waiver for the use of his subsequent uncounseled statements or resulting evidence against him"

We think that the view expressed by the majority is the proper one to be followed in Maryland. The minority view holds that a suspect's request for counsel must be honored, but a lawyer's request for a client need not be. While that statement may have some appeal and may be correct in some situations, it flies in the face of Miranda v. Arizona, 384 U.S. 436 (1966), that police interference with consultations between defendant and attorney "constitutes a violation of Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake." 601 P.2d at 278-79.

It is one thing to say a lawyer has no right to see a client; it is quite another to say that an accused knowingly and intelligently waived his right to counsel and his right against self-incrimination when he is purposely kept in the dark about the fact that his lawyer is in the next room.

Although appellant's testimony, that he advised the police that he was en route to his lawyer's office, was rejected by the trial court, we think it is significant that he told the District Court Commissioner that he wanted an attorney. The written confession introduced into evidence was obtained after his appearance before the Commissioner.

We hold that it was error to admit the confession obtained after counsel appeared and requested that appellant be permitted to confer with him, or that appellant be advised of counsel's availability. We express no opinion on the admissibility of the oral confession that preceded the employment of counsel on appellant's behalf.

Our reversal as to the first issue makes it unnecessary to review appellant's remaining challenges. We do not lightly reverse a conviction for the brutal, senseless assassination of two citizens, one of whom was a police officer. The swift and relentless

efforts of the police in apprehending those responsible is commendable. At the same time, the method employed in gathering evidence must conform to constitutional guarantees. A quotation from Brewer v. Williams, 430 U.S. 387 (1977) is appropriate.

> ". . . yet disinterested zeal for the public good does not assure either wisdom or right in the methods it pursues . . ." But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the constitution extends to us all."

JUDGMENTS REVERSED. CASE REMANDED TO CIRCUIT COURT FOR CALVERT COUNTY FOR NEW TRIAL.

COSTS TO BE PAID BY CALVERT COUNTY.

STATE OF MARYLAND	*	IN THE
	*	COURT OF APPEALS
	*	OF MARYLAND
v.	*	Petition Docket No. 679
	*	September Term, 1984
	*	(No. 506, September Term, 1984
KAMEL ALI ELFADL	*	Court of Special Appeals)

ORDER

Upon consideration of the petition for writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

[Seal]

/s/ Robert C. Murphy
Chief Judge

Date: May 10, 1985